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8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**
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11 KIM FORTES,
12
13 vs. Plaintiff,
14 MICHAEL J. ASTRUE, Commissioner of
Social Security,
15 Defendant.

CASE NO. 08cv317 BTM(RBB)

**ORDER GRANTING IN PART AND
DENYING IN PART MOTION FOR
ATTORNEY'S FEES**

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17 Plaintiff has filed a motion for attorney's fees under the Equal Access to Justice Act.
18 For the reasons discussed below, Plaintiff's motion is **GRANTED IN PART** and **DENIED IN**
19 **PART**.
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21 **I. BACKGROUND**

22 In this action, Plaintiff sought review of the denial of her applications for Disability
23 Insurance Benefits and Supplemental Security Income under Titles II and XVI of the Social
24 Security Act. In an order filed on March 18, 2009, the Court granted Plaintiff's motion for
25 summary judgment and remanded for further proceedings consistent with the Court's Order.
26 The Court remanded on the grounds that (1) the ALJ did not address Dr. Pena's opinion that
27 Plaintiff was restricted to part-time work; and (2) the ALJ failed to ask the Vocational Expert
28 about an apparent conflict between information provided in the Dictionary of Occupational

1 Titles ("DOT") and the VE's testimony that Plaintiff could perform the jobs of host and
2 cashier.

3 4 **II. DISCUSSION**

5 Under the Equal Access to Justice Act ("EAJA"), the prevailing party, other than the
6 United States, is entitled to attorney's fees unless the government's position was
7 substantially justified or special circumstances exist that render the award of fees unjust. 28
8 U.S.C. § 2412(d)(1)(A). Defendant disputes that Plaintiff is entitled to an award of attorney's
9 fees and, in the event that the Court finds otherwise, challenges the reasonableness of the
10 fees sought.

11 12 **A. Substantial Justification**

13 Defendant contends that the government's position was substantially justified with
14 respect to the two issues that were the subject of the Court's remand. The Court disagrees.

15 "Substantially justified" means "justified in substance or in the main" – i.e., justified "to
16 a degree that could satisfy a reasonable person." Pierce v. Underwood, 487 U.S. 552, 565
17 (1988). A substantially justified position must have a reasonable basis in both law and fact.
18 Id. The government's position must be substantially justified at each stage of the
19 proceedings. Williams v. Bowen, 966 F.2d 1259, 1261 (9th Cir. 1991).

20 With respect to Dr. Pena's opinion that Plaintiff was restricted to part-time work,
21 Defendant argues that the ALJ was not required to address this evidence specifically and
22 that the ALJ reasonably concluded, based on all of the evidence before him, that Plaintiff
23 could perform full-time unskilled work. In Vincent on behalf of Vincent v. Heckler, 739 F.2d
24 1393, 1394-95 (9th Cir. 1984), cited by Defendant, the Ninth Circuit explained that the
25 Secretary need not discuss all evidence presented to him, but, rather, must explain why
26 "significant probative evidence has been rejected." In Vincent, the Ninth Circuit held that the
27 ALJ did not have to explain why he rejected a psychiatrist's report because the report was
28 controverted by medical reports prepared by other doctors and the report was an "after-the-

1 fact psychiatric diagnosis.”

2 In contrast, in this case, Dr. Pena’s opinion that Plaintiff was restricted to part-time
3 work was “significant probative evidence.” As pointed out by Defendant, Matthew Carroll,
4 M.D. concluded that Plaintiff had no mental limitations. However, Dr. Carroll evaluated
5 Plaintiff in September 2006. Dr. Pena evaluated Plaintiff in April 2007. The ALJ indicated,
6 “the record reflects no severe mental impairment *until recently*.” (Tr. 23.) Apparently, the ALJ
7 believed that Plaintiff’s mental condition worsened after her evaluation by Dr. Carroll and
8 adopted Dr. Pena’s conclusion that Plaintiff suffered from major depressive disorder and was
9 limited to performing simple and repetitive tasks as a result of her mental condition. In light
10 of the weight the ALJ placed on Dr. Pena’s opinion in general (and the lack of contradictory
11 opinions from the same time period), the ALJ was required to address the aspect of Dr.
12 Pena’s opinion concerning Plaintiff’s restriction to part-time work.

13 As for the ALJ’s failure to resolve conflicts between the occupational information
14 provided by the DOT and the VE’s testimony, it is clear that the ALJ failed to follow the law.
15 The job of cashier (DOT 211.362-010) requires *frequent* reaching, handling, and fingering.
16 The job of host (DOT 352.667-010) requires *frequent* reaching and handling. In addition,
17 both jobs have a skill level above “unskilled.”¹ Plaintiff could only perform unskilled work and
18 was limited to *occasional* handling and fine fingering with her right hand.

19 Under SSR 00-4p, the ALJ has an affirmative duty to (1) ask the VE if the evidence
20 he or she provided conflicts with information provided in the DOT; and (2) if the VE’s
21 evidence appears to conflict with the DOT, the ALJ must obtain a reasonable explanation for
22 the apparent conflict. In Massachi v. Astrue, 486 F.3d 1149 (9th Cir. 2007), the Ninth Circuit
23 held that the ALJ must perform the inquiries under SSR 00-4p before relying on a VE’s

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25 ¹ As noted in the Court’s order of March 18, 2009, even though Defendant suggests
26 the alternate jobs of “cashier II” (DOT 211.645-010) and “goodwill ambassador” (DOT
27 293.357-018), both of which are “unskilled,” these jobs also require frequent reaching,
28 handling, and fingering. The VE indicated that the host job (DOT 352.667-010) had
“occasional” fine fingering and grasping but overlooked the fact that “frequent” handling was
required. (Tr. 419.) The VE also identified “usher” (DOT 344.137-010) as a job Plaintiff could
do with the additional limitations of her right hand. However, the “usher” job has an SVP of
4 and is therefore not “unskilled.”

1 testimony regarding the requirements of a particular job.

2 The ALJ did not ask the VE whether her testimony conflicted with any information
3 provided in the DOT and, if so, whether there was a reasonable explanation for the conflict.
4 The ALJ's failure to perform the appropriate inquiries under SSR 00-4p is significant because
5 there was a conflict between the VE's testimony and the information provided in the DOT.
6 The jobs identified by the VE required *frequent* handling and/or fingering whereas Plaintiff
7 was limited to *occasional* handling/fingering with her right hand.

8 Defendant argues that the DOT does not indicate that reaching, handling, or fingering
9 must be performed *bilaterally*. However, nor does the DOT state that reaching, handling, or
10 fingering *need only be done on one side*. As explained in Defendant's papers, "The DOT
11 lists *maximum* requirements of occupations as *generally* performed, not the *range of*
12 requirements of a *particular* job as it is performed in *specific* settings." The maximum
13 requirements of the host and cashier positions include a full range of frequent reaching,
14 handling, and/or fingering – i.e., on both sides. Plaintiff's inability to perform frequent
15 handling/ fingering with her right hand (her dominant hand in fact) was inconsistent with
16 these requirements. Perhaps the VE could have testified that in specific cashier or host jobs,
17 frequent use of the dominant hand is not necessary. However, the ALJ never provided the
18 VE with an opportunity to provide a reasonable explanation for the conflict.

19 The ALJ clearly did not follow the requirements of SSR 00-4p. Therefore, the
20 government's pre-litigation and post-litigation positions on this issue were not substantially
21 justified. Plaintiff is entitled to attorney's fees under the EAJA.

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23 B. Reasonableness of Fees

24 The award of attorney's fees under the EAJA must be reasonable. 28 U.S.C. §
25 2412(d)(2)(A). "The most useful starting point for determining the amount of a reasonable
26 fee is the number of hours reasonably expended on the litigation multiplied by a reasonable
27 hourly rate." Hensley v. Eckerhart, 461 U.S. 424, 433 (1983). Hours that are excessive,
28 redundant, or otherwise unnecessary should be excluded from an award of fees. Id. at 434.

1 “Hours that are not properly billed to one’s *client* also are not properly billed to one’s
2 *adversary* pursuant to statutory authority.” *Id.* (quoting Copeland v. Marshall, 641 F.2d 880,
3 891 (D.C. Cir. 1980) (en banc)).

4 Plaintiff seeks fees based on an hourly rate of \$172. This rate is based on the \$125
5 per hour rate set forth in 28 U.S.C. § 2412(d)(2)(A), adjusted for cost-of-living increases.
6 Defendant does not challenge the rate, which the Court finds to be reasonable.

7 Plaintiff seeks to recover fees for 56.24 hours of work performed in connection with
8 the litigation of this action and the preparation of the EAJA fee motion and reply. Defendant
9 contends that Plaintiff should not be awarded the full amount of fees claimed because some
10 of the time billed by Plaintiff’s counsel was excessive or unnecessary. The Court agrees in
11 part.

12 Defendant argues that Plaintiff’s attorney billed a significant amount of time for work
13 that was purely clerical in nature, such as calling Chambers, signing a document, and
14 reviewing notices of electronic filing. The Court disagrees that these tasks are “purely
15 clerical” and not recoverable. Part of an attorney’s duties include communicating with
16 Chambers to obtain hearing dates, signing and reviewing documents before filing, and
17 reviewing e-mails and notices of electronic filing from the Court.

18 However, the Court agrees that an excessive amount of time was billed for reviewing
19 the notices of electronic filing (as opposed to the time spent reviewing substantive underlying
20 documents) and e-mails from the Court. It only takes a few seconds to review a notice of
21 electronic filing to take note that something has been filed. Plaintiff’s counsel usually billed
22 the minimum increment of time under her billing system - .08 (4.8 minutes) – for each
23 occasion she reviewed a notice of electronic filing or e-mail from the Court. However, since
24 she received many notices of electronic filing, the cumulative time billed for reviewing the
25 notices far exceeds the actual time she spent glancing at the e-mails. Therefore, the Court
26 will allow the recovery of only .25 hours for the review of the notices of electronic filing or e-
27 mails from the Court on 2/20/08, 2/22/08, 3/25/08, 3/26/08, 3/31/08, 5/22/08, 6/2/08, 8/28/08,
28 10/12/08, 10/15/08, 10/28/08, 11/4/08, 11/13/08, 11/24/08, 11/25/08, 12/23/08 and 3/18/09.

1 Plaintiff's counsel billed 1.50 hours on 5/28/08 for "Review United States District Court
2 email re: Administrative Record," 2.75 hours on 11/24/08 for "Review United States District
3 Court email re: Notice of Cross-Motion for Summary Judgment," and 2.75 hours on 3/18/09
4 for "Review United States District Court email re: United States District Court Judgment."
5 The Court assumes that the time billed for these entries was for reviewing the underlying
6 documents referenced in the notices of electronic filing. The Court reduces the time for
7 reviewing and analyzing the Court's 9-page order to 2 hours, but otherwise allows this time.

8 Defendant argues that Plaintiff's counsel should not be able to recover for the 1.15
9 hours spent in connection with obtaining an extension fo time to file her motion for summary
10 judgment. The Court disagrees. Attorneys often have to seek extensions from the Court for
11 various reasons in the course of representing their clients. The time spent obtaining
12 extensions can be properly billed to one's client and can be sought from one's adversary as
13 well.

14 Defendant argues that Plaintiff should not be able to recover 2.95 hours billed in
15 connection with a reply that was never filed. Although no reply was filed, Plaintiff's counsel
16 had to analyze whether it made strategic sense to file a reply on any of the issues.
17 Accordingly, the Court will allow the recovery of 2 hours for analysis regarding whether to file
18 a reply.

19 Defendant also argues that Plaintiff's counsel spent an excessive amount of time
20 preparing the EAJA fee motion. The Court disagrees. It was reasonable for counsel to
21 spend 2.75 hours reviewing time records and logs to prepare a billing sheet. Counsel was
22 required to carefully review her records to determine which tasks were properly charged to
23 the client and to confirm that the descriptions and time entries were accurate and did not
24 reveal any privileged information. The 3.2 hours billed for the preparation of the rest of the
25 fee motion was also reasonable.

26 Plaintiff seeks 9.5 hours for work performed in connection with the reply in support of
27 the EAJA fee motion. The Court will allow recovery for 4 hours of this time. The reply brief
28 was unnecessarily long (19 pages). Four hours would have been an adequate amount of

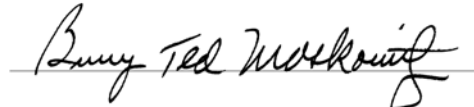
1 time to respond to the issues raised in the opposition papers.

2 Other than the hours disallowed by the Court above, the Court finds the hours billed
3 by Plaintiff's counsel to be reasonable. Taking into account the reductions detailed above,
4 the Court allows the recovery of 47.49 hours at the rate of \$172 per hour, for a total award
5 of \$8,168.28.

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7 **III. CONCLUSION**

8 For the reasons discussed above, Plaintiff's motion for attorney's fees is **GRANTED**
9 **IN PART** and **DENIED IN PART**. The Court awards Plaintiff \$8,168.28 in fees, to be paid
10 directly to Plaintiff's counsel.

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12 DATED: September 17, 2009

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14 Honorable Barry Ted Moskowitz
15 United States District Judge
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